MALAYSIA RUBBER DEVELOPMENT CORP.

v.

MALAYSIA NATIONAL INSURANCE SDN. BHD

HIGH COURT MALAYA, KUALA LUMPUR
ZAKARIA YATIM J
[CIVIL SUIT NO. 2281 OF 1977]
8 MAY 1984

INSURANCE: *Goods - Transit policy - Goods destroyed by fire while in storage - Whether indemnity payable.*

STATUTORY INTERPRETATION: *Ambiguity in insurance policy - Principle applicable.*

The plaintiff had insured their goods with the defendant under a "goods in transit policy". While the policy was in force, a fire broke out at the plaintiff's godown building at Sungei Way and the goods in the building were destroyed by the fire. The plaintiff claimed indemnity from the defendant under the policy of insurance. The defendant denied liability, alleging that the goods were being housed in the godown for the purpose of storage, making up, packing or processing at the time of the fire and that the policy, under Exception 6, did not cover the goods while being so stored. The plaintiff, on the other hand, claimed that the goods were being housed temporarily only while waiting for the vessels which were to take them to call at Port Klang.

Held:

[1] The plaintiff were entitled to be indemnified by the defendant for the loss and damage caused by the fire at the godown. There was ambiguity in the relevant clauses of the policy. Therefore the principle that the policy must be construed *contra proferentem* must apply and the policy must be construed in favour of the plaintiff. *(Metal Scrap & By Products Ltd. v. Federated Conveyors Ltd. & Tribble (Third Party)* [1953] 1 Lloyd's LR 221; *Central Lorry Service Co. Sdn. Bhd. v. The American Insurance Co.* [1981] 2 MLJ 40; *Lim Chin Yok Co. Ltd. v. Malayan Insurance Co. Inc.* [1975] 1 MLJ 101).

[2] Even if there was no ambiguity in the language of the policy, the defendant were still liable. The burden of proving the plaintiff had contravened Exception 6 rested upon the defendant and the defendant had failed to discharge the burden. The plaintiff, on the other hand, had proved their case. The degree of proof required of them to establish a *prima facie* case. *(Bond Air Services Ltd. v. Hill* [1955] 2 QB 417 at 427 & 428).

[Judgment for the plaintiff.]

Cases referred to:

Metal Scrap & By Products Ltd. v. Federal Conveyors Ltd. & Tribble (Third Party) [1953] 1 Lloyd's LR 221
Central Lorry Service Co. Sdn. Bhd. v. The American Insurance Co. [1981] 2 MLJ 40
Lim Chin Yok Co. Ltd. v. Malayan Insurance Co. Inc [1975] 1 MLJ 101
Bond Air Services Ltd. v. Hill [1955] 2 QB 417

Other sources referred to:

General Principles of Insurance Law, 4th Edn., p. 441
Shorter Oxford English Dictionary

For the plaintiff - S. Radhakrishnan; M/s. Shearn Delamore & Co., and Drew & Napier
For the defendant - Y. M. Raja Aziz Addruse; M/s. Rithauddeen & Aziz

JUDGMENT

Zakaria Yatim J:

The plaintiff is a body corporate in Malaysia incorporated under the Malayan Rubber Fund (Research and Development) Ordinance, 1958, having its office at No. 7, Jalan Eaton, Kuala Lumpur. The defendant is an insurance Company incorporated in Malaysia and having its place of business at Wisma Yakin, Kuala Lumpur.

In consideration of premiums paid by the plaintiff, the defendant issued the plaintiff with Goods in Transit Insurance Policy No. GT/0010 covering the period from 1 October 1975 to 30 September 1976.

While the policy was in force, on or about 4 October 1975, a fire took place in the plaintiff's godown building at Sungei Way. The goods in the building, namely rubber, were destroyed by the fire. The plaintiff claimed indemnity from the defendant under the said policy of insurance. The amount claimed by the plaintiff is RM1,952,884.54.

The defendant denied liability to indemnify the plaintiff under the Policy. According to the defendant, its liability under the Policy was subject to the condition, *inter alia*, that the said property was lost, damaged or destroyed by fire while being temporarily housed in the ordinary course of transit otherwise than for the purpose of storage, making up, packing or processing. It was contended by the defendant that the property alleged to have been destroyed was, at the time that the fire took place, being housed in the godown for the purpose of storage, making up, packing or processing.

In their evidence adduced in Court, the witnesses for the plaintiff stated that the plaintiff had thirteen rubber factories throughout Peninsular Malaysia. From these factories the rubber was sent for export to Port Klang. On its way to Port Klang, the goods were temporarily housed at the godown in Sungei Way. When the rubber arrived at the godown it came in one ton pallet. There were thirty bales to each one ton pallet. The rubber was kept at the godown whilst waiting for the vessels to call at Port Klang. It took two or three days before the vessels arrived. Sometimes there was either a congestion at Port Klang or a delay in the arrival of vessels. When this happened, the rubber would be kept in the godown at Sungei Way for a longer period of about one month before it was delivered to Port Klang for shipment. The plaintiff denied that any packing or processing of the rubber was done at the godown.

The defendant, in its evidence alleged that the goods received at the godown was kept for a period of time varying from a few days to as long as two or three months. The defendant also said that the process of shrink wrapping and stensilling of the pallet was carried out at the godown.

In order to determine whether the plaintiff is entitled to be indemnified under the Policy, it is necessary to examine the relevant provisions contained in the Policy. Paragraph two of the Policy states:

> Now this Policy Witnesseth that if during the Period of Insurance the Property whilst in or on or being loaded on or unloaded from any road vehicle or passenger or goods train or whilst temporarily housed in the ordinary course of transit whether on or off the said conveyances within the Territorial Limits shall be lost destroyed or damaged by ***Fire or Accidental Means***
>
> then the Insurers shall indemnify the Insured in respect of such loss destruction or damage but not exceeding the Limits of Liability.

The defendant, in its defence relied on Exception 6 of the Policy. The Exception states:-

> (6) Loss destruction or damage whilst the property is temporarily housed in the course of transit for the purpose of storage making up packing or processing.

The Schedule attached to the Policy described the property in transit as follows:

> On Processed SMR rubber packed in 1 metric ton ISO pallets and concentrated latex whilst in transit by road & / or rail from Insured's various factories in West Malaysia to Port Klang and / or Butterworth and/or Singapore and when applicable Pasir Gudang.

In my opinion, there are certain terms in the relevant parts of the Policy quoted above which are ambiguous. The second paragraph refers to goods "... while temporarily housed in the ordinary course of transit ..." According to *The Shorter Oxford English Dictionary*, the word "temporary" means lasting for a limited time. It is the opposite of the word "permanent". Thus, the words "temporarily housed" can mean that the goods are to be kept in the godown within a limited time, which means a few hours, a few days or even one or two months. The word to "house" can also mean to keep or to store in a building. The term "temporarily housed" can also mean temporary storage. But under Exception 6 of the Policy, the defendant is not liable to indemnify the plaintiff if the goods were damaged "whilst temporarily housed in the course of transit for the purpose of storage ..." The word to "house" is, therefore, not clear and there appears to be a contradiction in terms in the Policy. The other words which are not clear to me are the terms "making up" used in Exception 6. The Policy did not define it and no evidence was adduced to explain the term.

Since there is ambiguity in the relevant clauses of the Policy, the principle that the Policy must be construed *contra proferentem* must apply. In *Metal Scrap & By Products Ltd. v. Federal Conveyors Ltd. & Tribble (Third Party)* [1953] 1 Lloyd's LR 221, Croom-Johnson J. said:-

> . . . there is one perfectly good rule of construction which has bound underwriters for very many years, and that is that if they choose the language, if it is their language, then the document must be construed *contra proferentem*, which means to say against the person who put the language into the document upon which he is relying or upon which anybody relies.

See also *Central Lorry Service Co. Sdn. Bhd. v. The American Insurance Co.* [1981] 2 MLJ 40 and *Lim Chin Yok Co. Ltd. v. Malayan Insurance Co. Inc* [1975] 1 MLJ 101. Applying this principle to the present case, the Policy should be construed in favour of the plaintiff, and the plaintiff is, therefore, entitled to be indemnified by the defendant for the loss and damage caused by the fire at the godown.

Even if there is no ambiguity in the language of the Policy, it is my view that the defendant is still liable to indemnify the plaintiff for the loss caused by the fire. The defendant, in its defence, relied mainly on the assertion that the plaintiff had contravened Exception 6 of the Policy. Counsel for the defendant, in his written submission stated, *inter alia*, as follows:

> What these documents suggest is that the rubber was being stored in the godown, that the rubber was, in fact, delivered from the factories to the godown and it was only after the rubber had been made up to meet orders that it was consigned to the overseas buyers and delivered to Port Klang for shipment, using the services of its forwarding agents, Harrisons and Crossfields. Such storage falls within Exception (6) stated in the Policy. By virtue of the provisions of that Exception, the defendant is not liable to indemnify the plaintiff in respect of the rubber destroyed by the fire.

The burden of proving that the plaintiff had contravened the provisions of Exception 6 rests upon the defendant. The law of this point was clearly laid down by Lord Goddard CJ, in *Bond Air Services Ltd. v. Hill* [1955] 2 QB 417 at 427 & 428. In that case the learned Chief Justice said:

> But I cannot find that these cases have ever been regarded either in any judgment or in the opinion of eminent text writers, as throwing doubt on what I think is axiomatic in insurance law, that, as it is always for an insurer to prove an exception, so it is for him to prove the breach of a condition which would relieve him from liability in respect of a particular loss. The respondent's contention no doubt is that, by providing that the observance of condition is to be a condition precedent to his liability to pay, the policy has shifted the onus on to the claimants. I do not doubt that the parties to a policy can use words which would relieve insurers of the onus and cast it on the assured, as they might with regard to any other matter affecting an insurer's liability: But, in my opinion, much clearer words than are used here would be necessary to change what I think, certainly for a century and probably for much longer, has always been regarded as a fundamental principle of insurance law, that it is for the insurers who wish to rely on a breach of condition to prove it ...

The only witness called by the defendant was the Insurance Loss Adjuster (DW1). According to him, the rubber was kept in the godown for as long as two to three months. He also said that the process of shrink wrapping and stensilling was carried out at the godown. But his evidence was only hearsay and there was no other evidence - documentary or otherwise - to support his testimony. On the other hand, the plaintiff, in their evidence, had shown that the rubber was temporarily kept in the godown for transit to Port Klang. I find that, on the balance of probability, the defendant had filed to prove that the rubber was housed in the godown for the purposes of storage, making up, packing or processing. The defendant, thus, failed to discharge the burden of proving that Exception 6 had been contravened by the plaintiff.

The plaintiff, on the other hand, had proved their case. The degree of proof required of them was to establish a *prima facie* case. See E.R.H. Ivamy, *General Principles of Insurance Law*, Fourth Edn., p. 441.

It was not disputed that a fire took place at the plaintiff's godown in Sungei Way which destroyed a large amount of rubber belonging to the plaintiff. It was also not disputed that the plaintiff took a Goods in Transit Insurance Policy No. 97/1110 from the defendant and the policy was in force at the time of the fire. From the evidence adduced, I am satisfied that the rubber was kept in the godown in the course of transit to Port Klang.

For the reasons stated above, I enter judgment for the plaintiff for the sum of RM1,952,884.54 and interest at 12% per annum from 4 October 1975 to the date of realization and costs.

Also found at [1984] 2 CLJ 184